

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MIGUEL MENDEZ

Claimant

V.

**GREENLEAF CONSTR. CO., LLC,
HILLCREST DEVELOPMENT, INC.,
BASIC DRYWALL & CONSTR.,
KANSAS LODGING, LLC, &
FERNANDO ROMAN**

Respondents

AND

**LIBERTY MUTUAL INSURANCE,
TECHNOLOGY INSURANCE CO.,
BUILDERS INSURANCE GROUP d/b/a
ASSOCIATION INSURANCE CO.**

Insurance Carriers

AND

**KANSAS WORKERS
COMPENSATION FUND**

Docket No. 1,066,248

ORDER

Insurance carrier Association Insurance Company (Association) requests review of Administrative Law Judge Pamela J. Fuller's September 25, 2013 preliminary hearing Order. Terry J. Malone of Dodge City, Kansas, appeared for claimant. Matthew Schaefer of Wichita, Kansas, appeared for Builders Insurance Group (Builders) d/b/a Association Insurance Company (Association). Ryan Wertz of Overland Park, Kansas, appeared for Hillcrest Development, Inc., and Technology Insurance Company (Hillcrest). John R. Emerson of Kansas City, Kansas, appeared for Basic Drywall & Construction and Liberty Mutual Insurance Company (Basic Drywall). William W. Jeter, of Hays, Kansas, appeared for the Kansas Workers Compensation Fund. There were no other appearances.

The record consists of the September 20, 2013 deposition transcript of Miguel Mendez and the September 24, 2013 preliminary hearing transcript, with exhibits, along with all pleadings in the administrative file.

ISSUES

The preliminary hearing Order awarded claimant temporary total disability and medical compensation at the expense of Greenleaf and its insurance carrier, Association. Greenleaf did not participate in the preliminary hearing, despite apparently receiving notice.

Association claims it did not provide insurance coverage for Greenleaf in Kansas. Association asserts no insurance policy was in evidence showing Association agreed to enforcement of the Kansas Workers Compensation Act against it as a party. Association argues the Division of Workers Compensation (Division) lacked subject matter jurisdiction to hold a preliminary hearing because claimant failed to give all parties at least seven days written notice of his intent to file his application for preliminary hearing.

Association argues the Division did not have personal jurisdiction over it because:

- Association is not organized under the laws of Kansas or authorized to do business in Kansas;
- the certificate of insurance showing Greenleaf was insured by Association was insufficient to confer personal jurisdiction over Association, absent a policy in evidence demonstrating jurisdiction; and
- due process and the 14th Amendment of the United States Constitution require certain “minimum contacts” between the state of Kansas and Association for the Division to have personal jurisdiction over Association.

Association attached to its brief: (1) internet print-outs purportedly showing that Association and Builders are not organized by the laws of Kansas or authorized to transact business in Kansas and (2) a Builders Insurance Group policy with Greenleaf.

Claimant’s response to the appeal is that he “can find no authority to refute the position of the Appellant, Association Insurance Company, that Kansas has no personal jurisdiction over it in the matter pending before the Director of Workers Compensation for the state of Kansas in the above-mentioned docketed claim.”¹

Hillcrest argues it is not liable. Basic Drywall would have the Board affirm the preliminary hearing Order. Basic Drywall argues Association’s remedy is to proceed to a preliminary hearing to present evidence and argument to Judge Fuller. Both Hillcrest and Basic Drywall assert documents Association attached to their brief should not be considered as part of the record.

The issue is: Did Association raise an appealable issue from a preliminary hearing Order?

¹ Claimant’s Brief at 1-2 (filed Nov. 13, 2013).

FINDINGS OF FACT

Various certificates of liability insurance were put into evidence, including a certificate showing Greenleaf to be insured for workers compensation by Association.

The preliminary hearing Order states:

That the claimant was hired by Fernando Roman and first worked for him on April 15th, 2013. Mr. Roman came to the claimant's house and offered him a job with his company. The claimant went to work for Mr. Roman at a hotel construction site in Dodge City, Kansas. That Fernando Roman was also known as Fernando Villa d/b/a RUT Painting. That Fernando Roman had been hired by Greenleaf Construction to do work on a hotel that was being constructed in Dodge City, Kansas. While that construction was being performed, the claimant met with personal injury by accident arising out of and in the course of that employment. That both Fernando Roman and Greenleaf Construction personnel supervised the claimant. Fernando Roman did not have workers' compensation insurance on the date of claimant's accident. Greenleaf Construction did have workers compensation insurance on that date. The policy is with Association Insurance Company and was for a policy period from January 10th, 2013 through January 10th, 2014. (Respondent's Exhibit 1 to the Preliminary Hearing Transcript)

In reviewing K.S.A. 44-503(a) and the evidence presented, Fernando Roman was a subcontractor of Greenleaf Construction. The claimant was not a self-employed subcontractor of Fernando Roman but was an employee.

The claimant's request for authorized medical treatment should be and the same is hereby granted and ordered paid by the respondent, Greenleaf Construction and its insurance carrier, Association Insurance Company.

That the claimant worked 9 hours per day, 7 days a week and was paid \$11.00 per hour. He worked from the 15th until his injury on the 22nd, which is 8 days. He was paid a total of \$1,100.00 which would be \$137.50 per day or \$962.50 for 7 days qualifying the claimant for the maximum rate for temporary total disability. Temporary total disability compensation is hereby granted and ordered paid by the respondent, Greenleaf Construction and its insurance carrier, Association Insurance Company at the rate of \$570.00 per week, commencing from April 23rd, 2013 and continuing until the claimant is returned to regular work, becomes re-employed or reaches maximum medical improvement.

That all outstanding and associated medical bills incurred by the claimant in connection with the work injury of April 22nd, 2013 are ordered paid by the respondent, Greenleaf Construction and its insurance carrier, Association Insurance Company.²

² ALJ Order at 1-2.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-523(a) states:

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

K.S.A. 2012 Supp. 44-534a states, in part:

(a) (1) After an application for a hearing has been filed pursuant to K.S.A. 44-534, and amendments thereto, the employee or the employer may make application for a preliminary hearing . . . on the issues of the furnishing of medical treatment and the payment of temporary total or temporary partial disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. . . . The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.A.R. 51-3-5a(c) states: "In no case shall an application for preliminary hearing be entertained by the administrative law judge when written notice has not been given to the adverse party pursuant to K.S.A. 44-534a."

K.S.A. 2012 Supp. 44-551(i)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 2012 Supp. 44-555c(a) states, in part:

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

ANALYSIS

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction³ and issues listed in K.S.A. 2012 Supp. 44-534a(a)(2) as jurisdictional issues, which are (1) did the worker sustain an accident, repetitive trauma or resulting injury, (2) did the injury arise out of and in the course of employment, (3) did the worker provide timely notice, and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.⁴

Association asserts their insurance policy did not cover Greenleaf for activities in Kansas. Travelers made this same argument on appeal from a preliminary hearing in *Carpenter*. Travelers argued it did not insure the employer for Kansas claims, it was not a proper party and the Division lacked jurisdiction over it. The Kansas Court of Appeals held such issue was not appealable from a preliminary hearing order. *Carpenter* is on point. Whether an insurance carrier provides coverage is not a jurisdictional issue listed in K.S.A. 2012 Supp. 44-534a(a)(2).⁵

³ K.S.A. 2012 Supp. 44-551.

⁴ See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁵ *Id.* at Syl. ¶ 4; *Morgan v. United Excel Corp., et al.*, No. 1,022,473, 2005 WL 3408005 (Kan. WCAB Nov. 14, 2005).

Association argues there was no jurisdiction because it was not organized under the laws of Kansas and is not authorized to transact business in Kansas, as based on its search of the Kansas Insurance Commissioner's website. Association argues no insurance policy was placed into evidence proving Association consented to Kansas jurisdiction. Additionally, Association argues the certificate of insurance showing Greenleaf was insured by Association is insufficient to confer personal jurisdiction over it because the territory in which coverage was valid, as listed in the insurance policy, was not proven based on the evidence. However, the documents Association appended to its brief are not part of the record. They were not introduced, offered or stipulated into evidence. These documents may convince Judge Fuller otherwise, but must first be presented to her.

*Abbey*⁶ provides some basis for Association's arguments. In *Abbey*, the Board found the employer and the State Insurance Fund of Oklahoma (Fund) liable for Abbey's benefits, despite the Fund protesting it was not subject to the Division's jurisdiction because it did not provide Kansas coverage. According to the Kansas Court of Appeals, "Under [K.S.A. 44-559], only insurance companies organized under Kansas law or authorized to transact business in Kansas and write such insurance in Kansas submit to the jurisdiction of Kansas." The Court reversed the Board and noted, "The Board found that the Fund was not organized under the laws of the State of Kansas and is not authorized to transact business in Kansas. Therefore, the Board lacked authority under K.S.A. 44-559 to exercise jurisdiction over the Fund."⁷

However, *Abbey* did not concern an appeal of a preliminary hearing order, but was only decided after a regular hearing. The rationale of *Carpenter*, a case specifically concerning an appeal from a preliminary hearing order, controls.⁸ *Abbey* does not apply at this stage of the proceedings.

⁶ *Abbey v. Cleveland Inspection Services, Inc.*, 30 Kan. App. 2d 114, 117, 41 P.3d 297 (2002).

⁷ *Id.* *Abbey* implies the Board had authority to explore whether insurance coverage existed. Such conclusion appears different than a number of cases holding coverage disputes are to be litigated in a separate proceeding. See *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 174, 239 P.3d 51 (2010); *Kuhn v. Grant County*, 201 Kan. 163, 171-72, 439 P.2d 155 (1968); *Landes v. Smith*, 189 Kan. 229, 236, 368 P.2d 302 (1962); *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 831-33, 366 P.2d 270 (1961); *Tull v. Atchison Leather Products, Inc.*, 37 Kan. App. 2d 87, 97, 150 P.3d 316 (2007).

This Board Member also notes that in *Johnson v. United Excel Corp.*, No. 99,428, 200 P.3d 38 (Kansas Court of Appeals unpublished opinion filed Jan. 30, 2009) *rev. denied* 289 Kan. 1279 (2009), the Court of Appeals indicated the Board erred in not construing an insurance policy to find a respondent did not secure the payment of compensation, as contained in K.S.A. 44-503(g) and K.S.A. 44-532b, where the policy was limited to coverage in Nebraska and limited extra-territorial coverage that did not cover Johnson's accidental injury in Kansas. *Abbey* and *Johnson* do not instruct the involved insurance companies to seek a remedy in a separate district court proceeding.

⁸ The Board did address the coverage dispute on appeal from an award *following a full hearing*. *Carpenter v. National Filter Service*, No. 227,852, 2003 WL 359851 (Kan. WCAB Jan. 30, 2003).

Another area of discussion concerns whether Association had appropriate notice of the preliminary hearing. Association does not argue it had no notice of the hearing, just that claimant failed to provide at least seven days written notice of his intent to file an application for preliminary hearing. Association does not argue it was not given an opportunity to be heard and defend itself. In any event, *Lott-Edwards*⁹ and *Kimbrough*¹⁰ indicate the employer is entitled due process and the insurance company has no separate right of due process. The Board is required to follow binding precedent.¹¹ Greenleaf had notice of the hearing, but did not participate. Based on the record before Judge Fuller, it appeared Association insured Greenleaf.

Lott-Edwards and *Kimbrough* may be distinguishable because the insurers in such cases were not denying coverage, as is the case here. The insurers in such cases were bound to a judgment based on K.S.A. 44-559¹² and K.S.A. 40-2212.¹³ In any event, the insurance carrier in *Carpenter* did deny coverage, which was not appealable from a preliminary hearing order. Association's argument boils down to the same argument made in *Carpenter* – that the insurance carrier should not have been a party because its policy did not cover injuries in Kansas. That argument is not presently appealable.

The Board does not have jurisdiction to hear Association's appeal. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.¹⁴ Accordingly, Association's appeal is dismissed.

⁹ *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 697, 6 P.3d 947 (2000).

¹⁰ *Kimrough v. University of Kansas Med. Center*, 276 Kan. 853, 857, 79 P.3d 1289 (2003).

¹¹ See *Gadberry v. R. L. Polk & Co.*, 25 Kan. App. 2d 800, 808, 975 P.2d 807 (1998).

¹² "Every policy of insurance against liability under this act shall be in accordance with the provisions of this act and shall be in a form approved by the commissioner of insurance. Such policy shall contain an agreement that the insurer accepts all of the provisions of this act, that the same may be enforced by any person entitled to any rights under this act as well as by the employer, that the insurer shall be a party to all agreements or proceedings under this act, and his appearance may be entered therein and jurisdiction over his person may be obtained as in this act provided, and such covenants shall be enforceable notwithstanding any default of the employer."

¹³ "Every policy issued by any insurance corporation, association or organization to assure the payment of compensation, under the workmen's compensation act, shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award, or judgment rendered against the insured. Every such policy shall provide that the employee shall have first lien upon any amount becoming due on account of such policy to the insured from the insurer and that in case of the legal incapacity, inability, or disability of the insured to receive the amount due and pay it over to the insured employee, or his dependents, said insurer shall pay the same direct to such employee, his agent, or to a trustee for him or his dependents to the extent of discharging any obligation of the insured to said employee or his dependents."

¹⁴ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

WHEREFORE, Association's appeal of the September 25, 2013 preliminary hearing Order is dismissed.¹⁵

IT IS SO ORDERED.

Dated this _____ day of November, 2013.

JOHN F. CARPINELLI
BOARD MEMBER

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Hon. Pamela J. Fuller, Administrative Law Judge

¹⁵ By statute, these preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.